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DTG Operations, Inc. and Communications Workers of America, AFL-CIO, CLC, Local 9003, Petitioner. Case 31-RC-175375

October 26, 2016

ORDER GRANTING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

The Petitioner's Request for Review of the Regional Director's Decision and Order is granted as it raises substantial issues warranting review.

Dated, Washington, D.C. October 26, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
MEMBER MISCIMARRA, dissenting.

The Regional Director dismissed the petition in this case, which seeks to add the Employer's Exit Gate Agents to an existing unit of other employees who perform work associated with the Employer's business, involving the rental of cars at the Employer's Los Angeles Airport facility. In my view, the Regional Director had no choice but to dismiss the representation petition because the petition sought to produce a mixed unit that would combine conventional employees with guards. Permitting the petition to proceed would be directly contrary to Section 9(b)(3) of the Act. Therefore, I believe the Petitioner's Request for Review does not raise any substantial issues, and I respectfully dissent from the Board's decision to grant review.

Section 9(c)(3) states the following:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board *shall not* . . . decide that any unit is appropriate for such purposes if it includes, together with other employees, *any individual*

*employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises. . . .*¹

In this case, the primary function of the Exit Gate Agents is "to protect property of the employer" (id.)—specifically, Exit Gate Agents protect the most important property owned by the Employer, which consists of rental cars. Consequently, the Exit Gate Agent is charged with the responsibility of preventing customers, employees and other people from removing the Employer's rental cars from the premises without authorization.

My colleagues apparently believe that "substantial issues" exist regarding whether Exit Gate Agents satisfy the definition of a "guard" because, as argued by the Petitioner, (i) the Exit Gate Agents do not staff the separate entrance that is most often used by employees (i.e., the Exit Gate Agents staff the entrances used by customers who leave the premises with rental cars that have been leased, although employees also sometimes use the same customer entrances), (ii) to the extent that Exit Gate Agents fail to staff the separate entrances most often used by employees, the Petitioner argues this means Exit Gate Agents are not protecting property "against employees" within the meaning of Sec. 9(b)(3), and (iii) Petitioner argues that many tasks done by Exit Gate Agents, such as checking relevant documents and preventing customers from taking purchases without paying, resemble the work done by nonguard employees like bank tellers, pharmacy technicians, auto parts counter employees, and meat cutters in a traditional butcher shop who try to prevent customers from leaving until purchased steaks are cut, wrapped, priced and paid for.

Regardless of whether Exit Gate Agents "protect" the Employer's property against employees, customers or other individuals, the Exit Gate Agents do what Section 9(b)(3) describes, which is "to enforce against employees *and other persons* rules to protect property of the employer."² In this respect, the Exit Gate Agents constitute "guards" as defined in Section 9(b)(3), and Congress decided that the Board cannot include them in a mixed unit consisting of other employees. See *Madison Square Garden*, 333 NLRB 643 (2001); *Allen Services Company, Inc.*, 314 NLRB 1060 (1994); *Pinkerton's National Detective Agency*, 111 NLRB 504 (1955). Thus, the Regional Director's reasoning in this case is compelled by

¹ Sec. 9(b)(3) (emphasis added). Section 9(b)(3) also provides that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

² Sec. 9(b)(3) (emphasis added).

Section 9(b)(3), and I believe none of the above arguments gives rise to any issues that warrant Board review.

Section 9(b)(3) was adopted to prevent the Board from exercising case-by-case discretion in this area. I believe this renders inappropriate my colleagues finding that the Regional Director's decision involves "substantial issues" that warrant Board review. Accordingly, I respectfully dissent from my colleagues' decision to grant review in this case.

Dated, Washington, D.C. October 26, 2016

Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD